No. 1945.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Plaintiff in Error,
vs.
Alice M. Gilliland,
Defendant in Error.

Memorandum for Plaintiff in Error Filed by Leave of Court.

E. W. Camp,
U. T. Clotfelter,
A. H. Van Cott,
Attorneys for Plaintiff in Error.

Dated May 8, 1911.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 1945.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Plaintiff in Error,
vs.
Alice M. Gilliland,
Defendant in Error.

Memorandum for Plaintiff in Error Filed by Leave of Court.

By leave of court granted May 1st, 1911, plaintiff in error submits this supplemental memorandum in answer to the brief and supplemental brief of the defendant in error.

In the supplemental brief at page 5 is cited Railway v. Ramsey, 22 Wall. 322, on the point that jurisdiction of the trial court may appear "either directly or by just inference from any part of the record." That case in-

volved the restoration of a lost record of removal and the effect of it is thus stated in the opinion of the same court in Denny v. Pironi, 141 U. S. 121, 35 L. Ed. 657:

> "While these cases settle the principle that it is not necessary that the essential facts shall be averred in the pleadings, they show that they must appear in such papers as properly constitute the record upon which judgment is entered, and not in averments which are improperly and surreptitiously introduced into the record for the purpose of healing a defect in this particular."

In the case at bar the record contains no hint of the citizenship of defendant in error.

In face of the long line of authorities holding that federal jurisdiction must appear somewhere in the record we shall not pursue this subject further.

In fact the rule is so well settled that this court thought it necessary to cite but one case on it in deciding Atchison etc. v. Frederickson, 177 Fed. 206. A very recent opinion from the Circuit Court of Appeals of the Second Circuit cites a number of the cases.

Newcomb v. Burbank, 181 Fed. 334.

On the proposition that this court should remand the case with orders that the judgment be vacated but that the verdict shall stand pending a determination of the jurisdictional question, the defendant in error cites two cases:

Pittsburg etc. Ry. Co. v. Nichols, 85 Fed. 869, and Grand Trunk etc. Ry. Co. v. Reddick, 160 Fed. 898.

In the former the opinion is very brief and does not indicate what was in the record; but apparently the court

was satisfied that no error had occurred at the trial, and that the verdict could not be successfully attacked. In that case it appeared, further, that the citizenship of the corporation defendant was shown, and that citizenship must have been in Massachusetts, because the court says that the Circuit Court would have had jurisdiction if the plaintiff below were a citizen of any other state than Massachusetts. The defendant being a citizen of Massachusetts, the action was properly brought in Massachusetts, if there was any diversity of citizenship at all. That distinguishes the case from the one before this court, for here the right of action accrued in the state of Kansas, the defendant is alleged to be a citizen of Kansas, and the only intimation of the plaintiff's citizenship is the statement contained in the brief for the defendant in error to the effect that she is and has for years been a citizen of the state of New York. It thus appears that this action was not brought in the proper district, since it was brought neither in the district of the defendant's citizenship nor in the district of the plaintiff's citizenship.

In the second case the court examined the bill of exceptions and found the trial free from error throughout, and for that reason allowed the verdict to stand while reversing the judgment. In the present case the court has not before it a bill of exceptions and cannot find for itself that no error was committed at the trial. It has in that behalf only such presumption as always accompanies the action of the trial court.

Moreover, in the case against Reddick it was said that if the plaintiff had averred that he was a citizen of Illi-

nois, in which state the action was brought, and that defendant was a corporation organized under the laws of Michigan, the issue could have been determined, etc. That is to say, the court assumes that it will be necessary, in case of an amendment, for the plaintiff to aver citizenship of one party or the other in the state in which the action is brought.

Defendant in error insists that the plaintiff in error ought to be estopped from questioning in any way the jurisdiction of the court after having allowed the case to go to trial on the merits without suggesting the jurisdictional question, and that therefore the plaintiff in error ought to be deemed estopped from now suggesting that the action was brought in the wrong district, and ought to be estopped from insisting that the action be dismissed or remanded for a trial *de novo.*

Estoppels ought to be mutual. If the defendant in error had failed to recover in the court below, she might on writ of error have urged the same point that has been suggested by the plaintiff in error, and she would not have been estopped to raise that point by the fact that she had chosen the federal Circuit Court for the trial of her case. This was decided in 1804 in the case of Capron v. Van Noorden, 2 Cranch. 126, and that ruling has been followed ever since.

In the case of Halsted v. Buster, 119 U. S. 341, Halsted, the plaintiff in the court below, was the plaintiff in error and secured reversal on the sole ground that he had failed to allege jurisdictional facts. In other words, a plaintiff omitting to allege jurisdictional facts is in a position at any time and at any stage of the proceeding

to compel a dismissal of the action, for the court cannot compel him to amend his pleading so as to show the jurisdiction of the court. He can experiment, and if he finds himself likely to be successful, may either, by amendment of the pleadings or perhaps by evidence and findings without amendment, cure the jurisdictional defect, whereas, if he finds himself likely to be beaten, he may call the court's attention to the lack of jurisdiction and forsake that tribunal to try his fortunes elsewhere.

The exceptional state of the record may possibly have justified the courts of the first and seventh circuits in the Pittsburg case and in the Great Western case above referred to in permitting the verdict to stand, but they are the only cases in which such a course has been followed, while in scores of cases, both in the circuit courts of appeal and in the federal Supreme Court, lack of jurisdictional averments has been made the ground either for an outright dismissal of the case or for a new trial on all the issues, after an amendment. This practice has been so uniform that the United States Supreme Court, in Mexican Cent. Ry. v. Duthie, 189 U. S. 76, a case in which jurisdiction depended upon diversity of citizenship, which had at first been insufficiently alleged, said:

> "If the complaint or petition had remained as it was originally framed and the case had then been carried to the Circuit Court of Appeals that court would have been constrained to reverse the judgment and remand the case for a new trial, with leave to amend."

So, in the case of Robertson v. Cease, 97 U. S. 646, where the jurisdiction depended on diversity of citizenship, which was not sufficiently alleged, the court said:

> "Since the record shows no case of which the Circuit Court had jurisdiction we do not feel at liberty upon this writ of error to determine any point affecting the merits of the litigation. The judgment of the Circuit Court is therefore reversed, with directions to grant a new trial, and for such further proceedings as may be in conformity to this opinion."

Inasmuch as a plaintiff waives nothing by failure to allege jurisdiction, and is in no wise estopped by such failure, we contend that if the defendant in error is to be permitted to amend her complaint by averring jurisdictional facts it should be upon the terms that the defendant may withdraw its appearance and file any plea to the amended complaint which it might in the first instance have filed, the same as if the amended complaint were the original complaint in the action.

From our study of the opinion of this court in the Frederickson case, 177 Fed. 206, we gather that the reason why this court did not in that case permit an amendment of the complaint was because it appeared from the bill of exceptions that the plaintiff if a citizen of any state was a citizen of Michigan, and it also appeared that the defendant in that case was a corporation of the state of Kansas, so that it was certain that if the complaint had been properly framed in the first place it would have shown upon its face that the action was brought in a district where neither the defendant nor the plaintiff was domiciled. The same reason for declining to remand the case with leave to amend exists in the present case. For from the statement made in the brief as

to the citizenship of defendant in error it appears that this action ought never to have been brought in the Circuit Court of the Southern District of California, nor in any district of the Ninth Circuit, but either in Kansas or in New York.

Dated May 8, 1911.

Respectfully submitted.

E. W. Camp,
U. T. Clotfelter,
A. H. Van Cott,
Attorneys for Plaintiff in Error.